McCLELLAN OIL CORP.

IBLA 83-599 Decided October 19, 1983

Appeal from decision by New Mexico State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease NM 30631.

Set aside and remanded.

1. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals -- Oil and Gas Leases: Termination

Where an oil and gas lessee timely pays its annual rental in accordance with an erroneous statement issued by the Bureau of Land Management, absent issuance of a notice of a deficiency as provided by 43 CFR 3108.2-1(b) the lease may not be held to have terminated as a matter of law because of the operation of the proviso found at 30 U.S.C. § 188(b) (1976) creating a statutory exception to the rule that failure to pay the lease rental on the anniversary date terminates the lease.

APPEARANCES: George H. Hunker, Jr., Esq., for appellant. 1/

OPINION BY ADMINISTRATIVE JUDGE ARNESS

McClellan Oil Corporation, appeals an April 6, 1983, decision by the New Mexico State Office, Bureau of Land Management (BLM), purporting to deny appellant's petition for reinstatement of New Mexico oil and gas lease NM 30631.

The decision from which appeal is taken states:

> A petition for reinstatement was filed by the lessee. The petition has been examined, and it has been determined that the lessee has not satisfactorily complied with the requirements for reinstatement as provided by the Act of May 12, 1970 [(Title 43 CFR 3108.2-1(c))]. Accordingly, the petition for reinstatement is hereby denied and the lease is considered to have terminated as of August 1, 1982. [Emphasis in original.]

1/ Gayle E. Manges, Esq., Office of the Solicitor, Santa Fe Field Office, supplied a brief to BLM which was considered by the Board in the decision of this appeal.

The petition for reinstatement referred to by the BLM decision is a letter from appellant's attorney dated November 2, 1982, which questions whether, under circumstances described, appellant might not be entitled to a notice of deficiency pursuant to 43 CFR 3108.2-1(b) as a result of an apparent error by BLM in making the courtesy billing to appellant for oil and gas lease NM 30631. 2/ The November 2 letter states facts upon which this conclusion is based, after first reciting the prior history of the lease dating to 1977. The letter then explains that a notice was sent to appellant in June 1982, "[T]hat the acreage in the lease had at least partially been included in a known geologic structure of a producing oil or gas field, as a consequence of which rentals for ensuing years would be calculated at the rate of $2 per annum," and then states:

> Pursuant to an undated courtesy billing notice requiring an annual rental "due by August 1, 1982" in the amount of $481, McClellan Oil Corporation, by check No. 1697 dated July 1, 1982, paid the amount requested of $481. McClellan is uncertain as to when, late in June, it received the courtesy notice. McClellan is unable to find its copy of the June 9, 1982 KGS Decision. On July 23, 1982, a receipt for payment was issued by the BLM showing that the amount due was actually $962, and that only $481 had been received. An unintelligible notice appears on the bottom of the receipt which states: "Under payment of $481, unless other action is pending or the balance . . ." This notation did not draw the attention of the rental paying clerk. A copy of the notice, a copy of the rental check and a copy of the receipt for payment as reflected by McClellan's records, are attached. On September 27, 1982, the remainder of the rentals in the amount of $481 were paid by McClellan.
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> A question has been raised as to whether NM 30631 terminated by operation of law. In our opinion, it did not, and we are suggesting that you obtain an opinion from the Solicitor in the light of the above facts * * *. [Emphasis in original.]

The Santa Fe Field Solicitor responded, on January 27, 1983, to appellant's letter, opining that oil and gas lease NM 30631 had terminated by operation of law notwithstanding claimed exceptions to provisions of the Act of February 25, 1920, as amended, 30 U.S.C. § 188(b) (1976), and the implementing regulations codified at 43 CFR 3108.2-1(b) (1982). Following a discussion of Departmental decisions dealing with cases where a BLM "courtesy billing" 3/ had figured in the circumstances of oil and gas lease terminations, the Field Solicitor concluded that, because more than 20 days had

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2/ Appellant has filed a motion challenging the BLM characterization of the appeal to be one involving a lease reinstatement and requesting prior consideration of appellant's argument that the lease was never terminated. The motion is granted for reasons stated in the opinion.

3/ "Courtesy Billing" refers to statements sent by BLM to lessees prior to the anniversary of oil and gas leases. These notices are not "bills" in the ordinary sense and are not required to be sent. See Otis Energy, Inc., 52 IBLA 316, 317 (1981).

passed since the anniversary of the lease without full payment of the amount due, there could be no reinstatement of the terminated lease. Following the Solicitor's advice, BLM, on April 6, 1983, announced its decision.

With its statement of reasons on appeal appellant has filed two affidavits from employees of McClellan Oil Corporation, which tend to support the circumstances described in the November 2 letter submitted to BLM by appellant. These representations by appellant are unchallenged and are consistent with the circumstances previously established to exist. Based upon the record on appeal taken in its entirety, the Board concludes that: Lease NM 30631 was effective August 1, 1977. Rentals in the amount of $481 annually were paid each year until 1982, when the lease was included in a known geologic structure (KGS). Appellant, in June 1982, received a notice of the KGS classification, but failed to post the notice to its records. The KGS notice informed appellant that the rental was raised to $962 annually. Later, appellant received a courtesy billing notice stating the rental payment due on August 1, 1982, to be $481. The clerk responsible for the payment checked three records of the appellant company to determine whether the BLM billing notice was correct. Since the KGS notice had not been posted, the error in the billing, which corresponded to the amount paid in prior years, was not detected. A check in the amount of $481 was sent to BLM, which received the payment prior to August 1, 1982. A receipt for payment of $481 was issued to appellant showing that the $481 payment had been received, but that $481 was still owing. On the copy of the receipt notice sent to appellant, the notation appears: "[U]nder payment of $481 unless other action is pending or the balance." According to BLM records this message should have read: "Underpayment of $481 unless other action is pending or the balance is paid by the due date. This lease may be terminated." On September 28, 1982, appellant tendered the remaining balance due. No new lease has been issued.

Under the circumstances described by appellant's affidavits, appellant's reliance upon the billing resulted in an underpayment. Whether or not this circumstance is material, on the record as constituted, it is clear that an erroneous courtesy billing was sent to appellant.

> [1] The provision of the statute relevant to this appeal provides: 4/
> Provided, That if the rental payment due under a lease is paid on or before the anniversary date but * * * (2) the payment was calculated in accordance * * * with a bill-or decision which has been rendered by * * * [the Secretary] and such figure, bill, or decision is found to be in error resulting in a deficiency, such lease shall not automatically terminate unless * * * (2) the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency sent to him by the Secretary.

4/ 30 U.S.C. § 188(b) (1976). For a history of the Act, as amended, and a discussion of the addition of this proviso to the Act, see Louis Samuel, 8 IBLA 268 (1972).

The implementing regulation, 43 CFR 3108.2-1(b) provides:

> (B) Exceptions. If the rental payment due under a lease is paid on or before its anniversary date but either the amount of the payment has been or is hereafter deficient and the deficiency is nominal as defined in this section, or the amount of payment made was determined in accordance with the rental or acreage figure stated in the lease or stated in a bill or decision rendered by an authorized officer and such figure is found to be in error resulting in a deficiency, such lease shall not have automatically terminated unless (1) a new lease had been issued prior to May 12, 1970, or (2) the lessee fails to pay the deficiency within the period prescribed in the Notice of Deficiency provided for in this section. A deficiency will be considered nominal if it is not more than $10 or five per centum (5 percent) of the total payment due, whichever is more. The authorized officer will send a Notice of Deficiency to the lessee on a form approved by the Director. The notice will be sent by certified mail, return receipt requested, and will allow the lessee 15 days from the date of receipt or until the due date, whichever is later, to submit the full balance due to the appropriate office. If the payment called for in the notice is not paid within the time allowed the lease will have terminated by operation of the law as of its anniversary date.

As appellant points out, the application of these laws in a similar situation has previously been considered by this Board in C.S.V. Oil Exploration Co., 45 IBLA 393 (1980), a case involving a claimed lease termination where there had been an erroneous courtesy billing by BLM. There the Board held:

> Appellant clearly paid "in accordance with a bill" which was found to be in error. Therefore, he was entitled to a notice of deficiency and an opportunity to pay the annual rental owing. The decision appealed from, which is a notice of termination of the lease, does not qualify as a "Notice of Deficiency" specifying 15 days in which pay, as is mandated by section 3108.2-1(b), supra.
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> The cases cited by BLM in its decision establish the principle that "[r]eliance upon receipt of such a [courtesy] notice (where it is not received) will not justify a failure to make timely payment of the lease rent" (Emphasis added), L. P. Weiner, 21 IBLA 336, 338 (1975). This is because BLM is under no obligation to provide a courtesy notice. As BLM's November 27 decision states, the obligation to pay annual rent arises from the terms of the statute. Regardless of this rule of law, however, where a lessee receives an erroneous courtesy notice and pays his annual rental in accordance with the notice, he is entitled to a notice of deficiency and 15 days in which to pay the amount owing. 43 CFR 3108.2-1(b). [5/] [Emphasis in original.]

5/ 45 IBLA at 395. See also in this connection, Lucinda E. Boggs, 45 IBLA 60 (1980); Joseph E. Steger, 20 IBLA 206 (1975).

The question remains, considering the effect of the holding in C.S.V. Oil, whether the payment receipt received by appellant containing the partial reference to termination constituted a "Notice of Deficiency" within the meaning of 43 CFR 3108.2-1(b). That regulation requires the notice to be sent "on a form approved by the Director." In this case, the form used was Departmental Form 1371-17 entitled "Receipt for Payment." While it stated that there was a deficiency in the rental amount paid, it failed to state that appellant was to pay the balance due within 15 days of receipt, or by the lease anniversary date if that was later, or the lease would terminate. Apparently also the notice was not sent by certified mail, return receipt requested, as required by the regulation. The rental receipt notice sent, as modified, does not, therefore, constitute a "Notice of Deficiency" as required by Departmental regulation, 43 CFR 3108.2-1(b). Because an erroneous courtesy billing was sent appellant he was, under the circumstances of this case, entitled to a "Notice of Deficiency" prior to lease termination. Consequently, under the guidance of this Board's holding in C.S.V. Oil Exploration Co., supra, appellant is entitled to claim an exception to the general rule that lease termination is the consequence of failure to pay annual rental on or before the anniversary date of a lease, where there is no well capable of producing oil or gas in paying quantities on the lease. 30 U.S.C. § 188 (1976). C.S.V. Oil Exploration Co., supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision finding that there had been a termination of lease NM 30631 is set aside, and a finding entered that the lease remains in effect pending issuance by BLM of a "Notice of Deficiency" pursuant to 43 CFR 3108.2-1(b). The record on appeal is remanded to BLM for further proceedings consistent with this opinion.

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Franklin D. Arness
Administrative Judge
Alternate Member

We concur:

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Douglas E. Henriques
Administrative Judge

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Gail M. Frazier
Administrative Judge